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DEVELOPMENT TRUST

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JENS ERIK SORENSEN, as Trustee of
SORENSEN RESEARCH AND
DEVELOPMENT TRUST,

Plaintiff

v.

SENCO PRODUCTS, INC., an Ohio
corporation; and DOES 1 – 100,

Defendants.

and related counterclaims.

) Case No. 08cv00071 BTM CAB

)

) **PLAINTIFF'S MEMORANDUM OF**

) **POINTS & AUTHORITIES IN**

) **SUPPORT OF MOTION FOR**

) **EXCEPTION TO STAY TO**

) **PRESERVE EVIDENCE**

)

) Date: August 8, 2008

) Time: 11:00 a.m.

) Courtroom 15 – 5th Floor

) The Hon. Barry T. Moskowitz

)

) *Oral Argument Has Been Respectfully*

) *Requested by Plaintiff*

)

)

)

1 Plaintiff, pursuant to a shortened procedure outlined by Judge Moskowitz in
 2 related cases,¹ hereby requests the Court for an exception to the stay entered in this
 3 case in order to preserve evidence that will otherwise be unavailable after the stay.
 4 Plaintiff has presented its arguments in brief form pursuant to the Court's request.

5 Plaintiff has already requested this exception and discovery by letters to
 6 Defendants' counsel, but Defendants have failed to agree. The only Accused
 7 Product identified to date is the Senco Collated Screw Driver.

8 The requested discovery is as follows:

- 9 1. Confirmation of preservation of all prototype and production
 10 molds used in the production of the Accused Products if they are
 11 within possession, custody, or control of named Defendants; and
- 12 2. Confirmation of preservation of all design and technical
 13 documents for the Accused Products that are in the possession,
 14 custody, or control of named Defendants.

15 For any of the above categories of evidence that are in the possession, custody,
 16 or control of non-parties (as Plaintiff understands some to be), Plaintiff requests as
 17 follows:

- 18 3. Sworn identification of the company name(s) and address(s) of all
 19 non-party manufacturers, suppliers, and importers for the
 20 Accused Products; and
- 21 4. Court leave to use appropriate procedural steps to acquire the
 22 above-listed categories of evidence from, and/or conduct plant
 23 inspections of, non-parties.

24 Plaintiff believes these items of discovery are necessary and that delay until
 25 completion of the '184 patent reexamination creates the risk of loss of evidence.

27 ¹ Sorensen v. Helen of Troy Texas Corporation, et al, Case No. 07cv02278 (see relevant
 28 portion of the transcript at Appendix A hereto); and Sorensen v. Black & Decker Corporation, Case
 No. 06cv1572 (see Docket # 264-277, various entries).

Infringement notices and other communications regarding these products always end up in the same place – Defendant Techtronic Industries North America and its group of interrelated companies which include Defendant One World Technologies (defendant in the related *Sorensen v. Emerson Electric* and *Sorensen v. Ryobi* cases, Case Nos. 08cv00060 and 08cv00070, respectively). *Kramer Decl.* ¶ 6.

Upon information and belief, the Senco Accused Products are manufactured through the same channels as the Ridgid® products that are the subject of the *Sorensen v. Emerson* case. As to those products, Plaintiff has received contradictory information pre-litigation from the Defendants regarding where and how the Accused Products are manufactured, whether domestically or offshore by companies other than the named Defendants, and companies which may or may not even have common ownership to the Defendants. See the concurrently filed “Motion for Exception to Stay for Preservation of Evidence” filed in the *Emerson* case. *Kramer Decl.* ¶ 7.

Despite request to Defendants’ joint counsel (joint also with the *Emerson* defendants and the defendant in the related *Sorensen v. Ryobi* case, Case No. 08cv00070), Plaintiff’s requests have been met only with feigned inability to even understand Plaintiff’s request for preservation of evidence (*Kramer Decl.*, ¶ 8, Exhibit A). There is no reason to believe that the prototype and production molds for the Accused Products, and related design and technical documents are being preserved by the named Defendant pending the stay of this case.

There is even less reason to believe that non-parties to this case are preserving evidence necessary to this case. “The obligation to preserve [evidence] arises when the party has notice that the evidence is relevant to litigation -- most commonly when the suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.” *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (2006).

1 Unidentified, and thus non-party, manufacturers, suppliers, and importers, of
2 the Accused Products may not have notice of this lawsuit and Plaintiff has no means
3 of ensuring that they are preserving evidence for this case. Neither the Court nor
4 Plaintiff can informally request evidence preservation, much less compel it, without
5 this identification.

6 WHEREFORE, Plaintiff respectfully requests the Court to order an exception
7 to the stay in this case for purpose of conducting the discovery outlined above.

8 DATED this Monday, June 09, 2008.

9
10 JENS ERIK SORENSEN, as Trustee of
11 SORENSEN RESEARCH AND DEVELOPMENT
12 TRUST, Plaintiff

13 _____
14 /s/ Melody A. Kramer
15 Melody A. Kramer, Esq.
16 J. Michael Kaler, Esq.
17 Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JENS ERIK SORENSEN, as)
Trustee of SORENSEN)
RESEARCH AND DEVELOPMENT)
TRUST,)
)
Plaintiff,) Case No. 07cv02278BTM
)
)
vs.)
)
HELEN OF TROY TEXAS)
CORPORATION; OXO)
INTERNATIONAL, LTD; and)
DOES 1-100,)
)
)
Defendants.)
) San Diego, California
)
) February 25, 2008

Status Conference

BEFORE THE HONORABLE BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

APPEARANCES :

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1 thing is if I grant them an extension of time to answer of 60
2 days, and I grant the stay without prejudice and they answer
3 on behalf of Helen of Troy of Texas, and Oxo International,
4 then I think everything is taken care of.

5 MR. VON ZEIPEL: That sounds good.

16:22:19

6 THE COURT: Mr. Kaler is about to speak.

7 MR. KALER: That would certainly be a resolution,
8 not one I'm thrilled with. Has the court considered the
9 possibility of a partial stay allowing some discovery, that
10 does not address claim construction issues, to preserve
11 evidence in these cases that are newly filed?

16:22:19

12 THE COURT: I have not considered it, but that is
13 certainly something that would be considered. No one should
14 be prejudiced by the stay. It would be unfair to the
15 plaintiff if there is a stay and something happens that they
16 lose evidence. So that's always an implied exception.

16:22:19

17 The stay is always granted without prejudice. If
18 that wasn't understood then perhaps it's my fault in not
19 making it clear.

20 MR. KALER: Would we need to bring a separate
21 motion?

16:22:20

22 THE COURT: First you would discuss it with the
23 party you would want to take discovery on, and if they didn't
24 agree, then you would then come before me.

25 MR. KALER: Okay.

16:22:20

1 THE COURT: And I think I would try to do it in a
2 way that the parties would file something very, very brief so
3 they don't take up a lot of attorney time and work, and then
4 I would hear it orally and I would rule on it right there.

5 In other words, you would file something, maybe a 16:22:20
6 page or two, saying we want to get an exception to the stay
7 for the following reasons, we are going to come into court on
8 such and such a date the clerk gives you, and we will flush
9 them out, but here it is in capsule form.

10 MR. KALER: Thank you, your Honor. 16:22:21

11 THE COURT: All right? So that's when I say the
12 stays are granted without prejudice. Well, does anyone have
13 a problem if we proceed this way? I know it's not ultimately
14 what you want, but you can't -- isn't there a song, You Can't
15 Always Get What You Want? 16:22:21

16 MR. KALER: Your Honor, I was actually hoping for
17 summary judgment in our favor this morning, but I'll take it.

18 THE COURT: Well, we will do an order in that
19 regard. Is 60 days enough to file an answer?

20 MR. VON ZEIPEL: I believe so. 16:22:21

21 THE COURT: And the order will provide that you can
22 file an amended answer 30 days after any re-examination
23 decision.

24 MR. VON ZEIPEL: Thank you, your Honor.

25 THE COURT: All right? So, then that will take 16:22:21